1949.

File No. O. Shops & Estt./49

Legal Deptt

A **BRANCH**

Subject:— Opinions under the Bombay Shops and Establishment Act. 1948

P=73
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File No. O. Shops and Estt./49

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C O N T E N T S.

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KVT. 12/6.

Evde 14/6

L.D.R.I. No. 687/15-1949

Under section 4 of the Bom. Shops and Establishments Act, 1948, notwithstanding anything contained in the Act, the provisions of the Act mentioned in the third column of Sch. II shall not apply to the establishments, employees and other persons mentioned against them in the Second Column of the said Schedule. A Commercial establishment like newspaper press, is not mentioned as exempt under Part I & of Schedule II Item No. 8 in Schedule II provides for "employees exclusively employed in any establishments in the Collection, delivery or conveyance of Goods outside the premises of any establishment". The term "goods" as defined in cl. (10) of section 2 includes all materials, commodities and articles. The definition is inclusive and not exhaustive. The term 'goods' as defined in section 2(7) of the Indian Sale of Goods Act appears to be exhaustive. The words "collection, delivery or conveyance of goods" in item No. 8, imply collection or delivery or some commodity or articles, and read with context, do not appear to include the case of a reporter gathering information and conveying the same to the Press. In the absence of any specific entry in Schedule II exempting the Newspaper Press from the provisions of the Act, the Act would be applicable to such establishments. The only feasible course for Government is to issue a Notification under the proviso to section 4 adding a relevant entry to Schedule II exempting reporters, editorial staff etc., from the provision of the Act. If approved, the papers may be "seen and returned" with the remark that the view taken by the Secy. Labour Department, in his note dated 14-1-49 is correct.

Sd/- R.L.A.

— — — to Labour Department No. 861 dt. 24-1-1949.

Office of the R.L.A.

Bombay Shops & Establishment Act.

Whether applicable to the office of the Commercial Secretary for Canada.

The Commercial Secretary for Canada presumes that the office of the Commerical Secretary for Canada will be exempted from the provisions of the Bombay Shops and Establishment Act. The R.L.A. is requested to advise whether any consular immunity attaches in this case on grounds of sovereignty etc.

The defintion of "commercial establishment" in section 2(4) of the Bombay Shops and Establishments Act, 1948, is so wide that the office of the Commercial Secretary for Canada would be governed by the provisions thereof unless it is exempted under section 4.

It appears that the Commercial Secretary for Canada enjoys the status of a consul (see para 19 of the Precedure for the recognition and official treatment of foreign Consular Officers in India). However, consular officers do not in principle possess any immunity from judicial process, whether penal or civil, but are shown every consideration not inconsistent with the due course of justice, in order to avoid unnecessary interference with their official, duties; but otherwise they are liable to be treated as members of the general public.

If a Consular Officer, even though acting in his official capacity and on the direct orders of his Government should in any way violate the law of this country, he is not immune from the ordinary consequences of such an Act. (see para 47 Ibid).

It is clear from the aforesaid instructions of the Government of India that the Commercial Secretary for Canada would not be entitled to claim any immunity from liability for contravention of any of the provisions of the Bombay Shops and Establishments Act, 1948. It appears, however, that the legal position of a Consul under the International law appears to give him some immunity from judicial process. In his article on Consular immunities published in the British Year Book of International Law, 1944, at p. 34, W.E. Beckett formulates this aspect of consular immunity in the following terms:-

> "Consular officers shall not be liable, in criminal or civil proceedings, in respect of acts performed in their official capacity and falling within the functions of consular officers under international law, unless their government request or assents through its diplomatic representative to the proceedings. A consular officer may, however, be held liable in civil actions arising out of contracts concluded by him in which he did not expressly contracts as agent for his Government and in which the other party looked to the consul personally for performance."

This statement is supported by judicial authorities, conventions and also authors on International Law. The concluding part of the aforesaid article of W.E. Becke may be quoted with advantage:

> "It can hardly be contested that it is essential for the proper discharge of consular duties that a consul should be immune from process in the local courts in respect of them. The instances of possible actions if this principle is recognised, referred to above, show the dangers to which he would otherwise be subject. No doubt other instances could easily be given. In the interest of the performance of their functions by consular officers abroad, Governments have every reason to uphold the principle. Recognition or the immunity in this case does not, of course, mean that if, for instance, a British subject is wrongfully injur

by the official act of a foreign consul in Great Britain there is no remedy, but merely that the remedy must be sought through the Foreign Office and the diplomatic channel as is the practice in the case of diplomatic officers, and, speaking generally, this remedy is not less efficacious and is certainly cheaper than recourse to the courts. The taking up of a case with the diplomatic mission is itself a strong means of pressure which is generally sufficient, and as a last resort in a flagrant case the exequatur can be withdrawn."

If the Commercial Secretary for Canada offends against the Bombay Shops and Establishments Act by failing to comply with its provisions, probably it may not thus be proper to prosecute him in Court; but it would certainly be open to Government to take up the case with the diplomatic mission.

However, that question does not arise at present What the Commercial Secretary for Canada desires to know is whether his office is exempted from the provisions of the Bombay Shops and Establishment Act A great majority of the servants employed in the office of the Commercial Secretary for Canada are Indian and it is necessary that the protection afforded to these persons by the Bombay shops and Establishments Act should be ensured. It would therefore be sufficient at this stage if the Commercial Secretary is informed that it is not proposed to grant to his office any exemption from the provisions of the Bombay Shops and Establishments Act. He may then, if he feels aggrieved by this policy, take up the question with the Ministry of Foreign Affairs.

Sd/- P.M. LAD,

Remembrancer of Legal Affairs.

U.H. to Labour Department, No. 880, dated the 24th January 1949.
EW. 9/6.

Office of the R.L.A.

Bombay Shops and Establishments Act, 1948. Section 2(6)&(7).

In the case of an establishment owned by a Joint Hindu Family all Coparceners would be deemed to be owners and as such, employers within the meaning of section 2(7) of the Bombay Shops and Establishments Act, 1948. Consequently the nephew who with his uncle forms the Joint Hindu Family and is employed in the establishment in the present case would not be an employee under section 2(6).

Sd/- P.M.LAD,

Remembrancer of Legal Affairs.

U. R. to Labour Department, No. 5930, dated the 27th May, 1949.

Submitted for signature.

S.E. - 26/5.

A.A.S. Id/- 26/5.

A.L.R. R.E. 26/5.

EVI. 8/6.

Office of the R.L.A.

Question whether "Libraries" would be covered by sec. 2(4) of the Bombay Shops and establishments Act 1948.

Since under Government Notification, Labour Department No. 8/48-I dated 28th April 1949 establishments pertaining to any kind of educational activities are exempt from all provisions of the Bombay Shops and Establishment Acts, 1948. It is immaterial whether such establishment does or does not carry on any business trade or profession so long as it pertains to an educational activity. Consequently all libraries, whether public or private and whether run for profit or for charity would be exempt from all provisions of the Act as their establishments pertain to the dissemination of knowledge which is an educational activity.

Sd/- P.M.LAD,
27/6
Remembrancer of Legal Affairs.

W.R. to Labour Dept., No. 7140, dated the 28th June 1949.

Submitted for signature.

Sd/- 27/6.

A.L.R. R.K.
27/6.

MVT. 8/6.

Attention is invited to R.L.A's recent opinion No. 6893 dated 22/6/1949 where a similar point was considered.

R.K. - 8/7.

R.L.A. P.M. Ld,
8/7.

U. R. to Labour Dept. No. 7710, dated. 11-7-1949.

EVY. 8/6.

Office of the R.L.A.

The Bombay Shops and Establishments Act 1948. Sections 19 & 26.

Whether a residential club or hotel is hit by

The short question raised by Secretary, Labour Department is whether a residential club or hotel is hit by sections 19 and 26 of the Bombay Shops and Establishments Act, 1948, so far as its restaurant or amusement section is concerned.

2. "Residential hotel" as defined in section 2(24) of the Bombay Shops and Establishments Acts, 1948, includes a club. "Restaurant or eating house" and "theatre" are separately defined in clauses (24) and (29) of section 2. Chapter IV relates to residential hotels, restaurants and eating houses. Section 19, which prescribes the opening and closing hours of restaurants and eating houses, applies only to restaurants and eating houses and not to residential hotels. Section 21 prescribes the daily hours of work in residential hotels, restaurants and eating houses. Comparing these provisions it is apparent that section 19 does not apply at all to residential hotels. Refreshment section attached to a residential club is a part and parcel of the residential club itself and cannot be separated therefrom for the purpose of controlling refreshment section alone. Consequently, refreshment section of a residential club would not be hit by section 19.

3. Section 26 of the Bombay Shops and Establishments Act prescribes the closing hour of theatres or other places or public amusement or entertainment. "Other places of public amusement" has to be read ejusdem with the previous

word "theatre". This is also apparent from the defintion of "theatre" in section 2(29), which includes any premises etc. for dramatic performances or for any other public amusement or entertainment. "Public amusement or entertainment" means amusement or entertainment for the public in general. The entertainment provided at a residential club is not a public entertainment in the sense that it is open to the public; for no one but a member has a right to enter the club. Hall's 500 points in Club Law and Procedure p. 79. Consequently, an entertainment provided at a residential club would be open only to the members thereof and their guests. It would, therefore, follow that the premises at which a residential club provides entertainment would not be a theatre or any other place of public amusement or entertainment within the meaning of section 26.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U. R. to Labour Department, No. 6898, dated the 22nd June 1949.

submitted for signature

Id/- 22/6.

A.L.R. R.K. 22/6.

R.L.A.

Please see R.L.A's opinions. 11366, dated 12-10-49.

and also opinion No.12619, dated 9-11-49.

Office of the R.L.A.

Bombay Shops & Establishments Act, 1948. Sections 2(25) & 19.

R.L.A's opinion No. 6898, dated 22/6/1949.

It appears from the figures supplied by Messrs. Wadia Ghandy & Co. relating to the attendance and residence of outside guests at the Dinner Ball Rm Rooms of the Taj Mahal and Greens Hotel that the p proportion of outside guests to residents in the Taj is about 1 to 3 while in the Greens Hotel, the number of outside guests attending the Dinner Ball is slightly less than that of the residents. Secretary, Labour Department considers that hotels or restaurants which are open to the public are not covered by the R.L.A's opinion No. 6898 dated 22/6/1949 and the Dinner Ball Rooms of the Taj and Greens being open to the public in addition to hotel residents are covered by section 19. R.L.A. is requested to advise.

As stated by the R.L.A. in his last opinion No. 6898 dated 22nd June 1949, section 19 of the Bombay Shops and Establishment Act, 1948 does not apply at all to residential hotels. "Residential hotel" as defined in section 2, clause 24 means, any premises used for the reception of guests and travellers desirous of dwelling and sleeping therein and includes clubs. "Restaurant or eatin house" as defined in section 2, clause 25 means, any premises in which is carried on wholly or partly the business of the supply of meals or refreshments to the public or a class of the public for consumption on the premises. It appears from these definitions that

if such a restaurant or eating house is used for the supply of meals or refreshments to the guests and travellers dwelling or sleeping in the hotel as well as to the general public, it will fallmmk within the definition in section 2, clause 25 and be governed by section 19. Consequently, if the Dinner and Ball Rooms of the Taj and Greens are open to the public in addition to the hotel residents, these rooms can be treated as restaurant and section 19 will apply. The view taken by the Secretary, Labour Department, is correct.

Sd/- P. M. LAD,
Remembrancer of Legal Affairs.

U. R. to Labour Department, No. 11366, dated the 12th October 1949.

Submitted for signature.

S.B. ✗ 12/10.

A.L.R. R.K. 11/10. R.L.A.

Please see R.L.A's opinion No. 12619 dated 9/11/1949 and also opinion No. 943 dated 20/1/1950.

RVY. 8/6.

Office of the R.L.A.

Bombay Shops and Establishments Act, 1948. Section 18(1).

The points raised in this case is practically similar to the first question considered in the linked case. It appears that during this month there are many festivals i.e. on the 8th Cocomut Day; 16th the Independence Day; 17th Gokul Ashtami and 27th Ganesh Chaturthi. The point raised in thi case is whether an employer can exchange these holidays with 'closed' days notified under section 18 sub-section (1)of the Shops and Establishments Act. In the linked case the view is taken that these 'closed days need not necessarily fall on the same day every week. Under section 18 sub-section (1) it is competent for an employer to alter the day fixed as a holiday once in three months, after notifying the alteration to the Inspector and making the necessary change in the notice in the shop or commercial establishment. The owner of the shop can, therefore, exchange these holdays with 'closed' days under section 18 sub-section (1) after notifying as provided therei provided such change has not been made previously during the year. Such a change would not affect the rights and privileages of the employees under Section 69.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.
118

U. R. to Labour Department No. 9100, dated the 11th August 1949.

submitted for signature.

Id/- 11/8.

A.L.R. R.K. - 11/8.

KVY. 8/7.

Office of the R.L.A.

Bombay Shops & Establishment Act, 1948. Sec. 18(5); and rule 18(5) of the S.E. Rules.

Eligibility for leave.

Attention of the Labour Department is invited to R.L.A's opinion No. 8715, dated the 3rd August 1949 wherein a similar point was considered under the Factories Act.

Sd/- P. M. LAD,
578
Remembrancer of Legal Affairs.

U. R. to Labour Dept. No. 8933, dated 6th August 1949.

Submitted for signature.

Id/- 5/8.

A.A.S. Id/- 5/8.

A.L.R. R.K. 5/8.

EVY. 8/6.

Office of the R.L.A.

Bombay Shops and Establishments Act, 1948. Sections 18(1) and 2(6).

The questions raised for the R.L.A's consideration are:-

(1) Whether the view expressed by the Labour Department that though under sub-section (1) of section 18 of the Bombay Shops and Establishments Act, 1948, a calendar of 'closed days' is required to be notified in advance, it is not necessary that such 'closed' days notified in advance should fall on the same day each week is correct; and

(2) Whether tailers working in tailoring establishments who secure their own orders and obtain their remuneration direct from the customers but pay half the charges to the establishment for using the machine, equipment etc., are employees within the meaning of section 2 clause (6) of the Act?

Question No. 1. Section 18 sub-section (1) of the Bombay Shops and Establishments Act, 1948 provides:

"Every shop and commercial establishment shall remain closed on one day of the week. The employer shall fix such day at the beginning of the year notify it to the Inspector and specify it in a notice prominently displayed in a conspicuous place in the shops or commercial establishment. The employer shall not alter such day more often than once in three months. He shall notify the alteration to the Inspector and make the necessary changes in notice in the shop or commercial establishment".

The object of this provision is to give one holiday each week to the employees in a shop or

commercial establishment. This holiday has to be fixed in advance at the beginning of the year and is required to be notified to the Insepector and specified in a notice prominently displayed in a conspicuous place in the shop or commercial establishment. This section does not prohibit the fixation of such holiday differently for each week. All that it prohibits is that once such day is fixed it should not be altered more often than once in three months. It does not, therefore, appear that the 'closed' days notified in advance should fall on the same day each week. Consequently, the view taken by the Labour Department appears to be correct.

Question No. 2. Section 2 clause (6) defines 'Employee' as "a person wholly or principally employed in or in connection with any establishment and includes the apprentice but does not include a member of the employer's family". The relationship of an employer and employee is implicit in this definition. The tailors who secure their own orders and obtain charges directly from their customers could not be deemed to be the employees of an establishmeht even though such tailors pay for the use of the Machine and equipment in the Shop, for what they pay would be by way of hire to the owner of the establishment. Consequently, such tailors cannot be considered as 'employees' within the meaning of section 2 clause(6).

Sd/- P. M. LAD,
11/8
Remembrancer of Legal Affairs.

U.R. to Labour Department No. 9099, dated the 11th August 1949.

submitted for signature.
Id/- 11/8.
A.A.S. Id/- 11/8.
Issued A.L.R. R.K. - 11/8.
C.S.P. - 11/8.

EVY. 9/6.

Office of the R.L.A.

Bombay Shops and Establishments Act, 1948.

Application of to suppliers of band parties and wood choppers.

The questions raised for R.L.A's consideration are:-

(1) Whether the Bombay Shops and Establishments Act, 1948, applies to suppliers of band parties;

(2) Whether wood-choppers who work for various Establishments and in an occasional and casual fashion are employees within the meaning of the Bombay Shops and Establishments Act.

2. Question No. (1):- According to the preamble of the Bombay Shops and Establishments Act, 1948, the employment must be in a shop, commercial establishment etc. "Employee" as defined in section 2(6) means a person wholly or principally employed in and in connection with any establishment. "Commercial establishment" as defined in section 2(4) means an establishment which carries on any business etc., and "establishment" as defined in section 2(8) means a shop, commercial establishment, residential hotel, restaurant etc. It is nowhere clearly defined as to what an "establishment" means. The ordinary meaning of "establishment" is "organised body of men maintained for a purpose; staff of servants etc., house of business; (see the concise Oxford English Dictionary) From the provisions of the Act contained in Chapters 2 and 3 relating to commercial establishments, it appears that the expression "commercial establishment" is used in the sense of a house of business. But the definition of "employee" contained in section 2(6), does not demand that the employee must be employed in the premises of such establishment. If the employee is elsewhere employed in connection with the business carried on by the establishment, it appears that the provisions of the Act would be attracted. It may be

that the said parties do not perform in any fixed premises, or there may not be regular hours of performance. But if the party is employed by a supplier as a sort of business, and if such party does give performance at various places at his bidding, it appears that the persons employed by him would be employees within the meaning of the Act, and the provisions thereof would apply, although the supplier of such party will have to be exempted from certain provisions of the Act.

3. Question No. (2):- A wood-chopper who is employed or who renders service as such in a wood depot where wood is sold in retail or wholesale would be an employee within the meaninging of the Act. However, if such wood-chopper is not regularly employed by an establishment but goes about chopping wood of the people as his own avocation, he would not be an employee within the meaning of ~~the Act~~. section 2(6), as he would not be considered employed in or in connection with any establishment.

Sd/- P.M. LAD,
418
Remembrancer of Legal Affairs.

U. R. to Labour Department No. 8827 dated the 4th August, 1949.

(Please also an R.L&A's No. 1043, dated 23/1/1950.)

submitted for signature.

Id/- 4/8.

A.A.S. Id/- 4/8.

A.L.R. R. K. 4/8.

Issued

C.SPP. 4/8.

EVY. 9/6.

Office of the R.L.A.

Question whether the establishment of the Board of Management of the Indian Institute of Science a "Commercial Establishment"

The Bombay Shops and Establishments Act 1948, Section 2(4).

It is true that by section 2(4) of the Bombay Shops and Establishments Act, 1948, the definition of "commercial establishment" is considerably widened and includes a charitable or other trust. But even then what is essential to bring the establishment of a charitable or other trust within the scope of that definition is that such charitable or other trust must be carrying on any business, trade or profession or any work in connection with or incidental or ancillary to any business, trade or profession. "The words 'business', 'trade' and 'profession' are synonymous in the sense of a calling for the purpose of livelihood: business, is ~~not~~ ~~limited~~ buying general, trade and profession are particular. All trade is business but all business is not trade. Buying and selling of merchandise is inseparable from trade but the exercise of one's knowledge and experience for the purpose of gain constitutes business. When learning or particular skill is required, it is a profession" (see Ayyar's Law Lexicon, p. 165). It appears, therefore, that the aim of all business, trade or profession is make gain. The Board of Management constituted under clause 11 of the Scheme for the administration and management of the properties and funds of the Indian Institute of Science is required to look after and manage the immoveable properties, collect the rents and other income thereof and make thereout all necessary and proper disbursements and also ascertain and set aside the

amounts for sinking fund, etc. (see clause 38 of the Scheme). It is clear from these provisions that the Board of Management, which is a trustee, manages the property not with a view to make any gain but to see that the management is efficiently conducted in the interest of the trust, It would therefore be difficult to say that the Board of Management is carrying on any business, trade or profession, etc., within the meaning of section 2(4) of the Bombay Shops and Establishments Act. Consequently, the establishment maintained by the Board of Management would not be governed by the provisions of the Bombay Shops and Establishments Act.

Sd/- P.M. LAD,
11/6
Remembrancer of Legal Affairs.

U. R. to Labour Department, No. 6496, dated the 13th June 1949.

submitted for signature.

Id/- 11/6.

A.L.R. R.K.
11/6.

Issued

C.S.P.
13/6.

EVY. 9/6.

Office of the R.L.A.

Statement of the Case.

While considering the question whether the office of the Board of Management of the Bombay Properties of the Insitute of Science, Bangalore could be said to be carrying on any "business trade or profession" within the meaning of section 2(4) of the Bombay Shops and Establishments Act 1948 (Bom. LXXXX of 1948), R.L.A. opined as follows:-

No. 6496 dt. 23/6/1949.

"It is true that by section 2(4) of the Bombay Shops and Establishments Act, 1948, the definition of 'Commercial establishment' is considerably widened and includes a charitable or other trust. But even then what is essential to bring the establishment of a charitable or other trust within the scope of that definition is that such charitable or other trust must be carrying on any business, trade or profession or any work in connection with or incidental or ancillary to any business, trade or profession. The words "business","trade" and "profession" are synonymous in the sense of a xxx calling for the purpose of livelihood: business is genral, trade and professions are particular. All trade is business but all business is not trade Buying and selling of merchandise is inseparable from trade but the exercise of one's knowledge and experience for the purpose of gain constitutes business. When learning of particular skill is required, it is a profession" (see Ayyar's Law Lexicon, p. 165). It appears, therefore, that the aim of all business, trade or profession is to make gain. The Board of Management constituted under clause 11 of the Scheme for the administration and management of the properties and funds of the Indian Institute of immoveable properties, collect the rents and other income thereof and make therout all necessary and proper disbursements and also ascertain and set aside the amounts for sinking fund, etc. (see clause 38 of the scheme). It is clear from these provisions that the Board of Management, which is a trustee, manges the property not with a

view to make any gain but to see that the management is efficiently conducted in the interest of the trust. It would therefore be difficult to say that the Board of Management is carrying on any business, trade or profession, etc; within the meaning of section 2(4) of the Bombay Shops and Establishments Act.

In his note dated 20th June 1949 the Secretary, Labour Department, however states:-

"Para 52 of the Shah Committee Report on the Shops Act expressed a clear intention ~~m~~ to include charitable and other trusts all of which engage a fairly large staff. It was with this intention that the definition of commercial establishments was widened. Where trust involve (1) production of gain or income from management of property or industry or trade or otherwise and (2) application of the whole or part of the income or other monies or properties to purposes of charity, the former aspect would probably come under commercial establishment, while the latter aspect may not. Prudent management by trustees with a view to collecting or creating income seems to amount to 'business' irrespective of the nature of application of the income which may be charitable."

Though a "commercial establishment" has been defined in section 2(4) of the Act as including a charitable or other trust, it is necessary to decide in each case whether such charitable or other trust carries on any business trade or profession or any work in connection with or incidental or ancillary to any business trade or profession. When no profit motive is involved, as in the present case, it would seem that the Board of Management would not be governed by the provisions of the Act.

As the question is of great importance, the Advocate General is requested to favour Government with his opinion in the matter.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.

U.R. to the Advocate General No. 7183, 21/6

No. 19 of 1949.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT
Bombay, 9th August 1949.

Re: Bombay properties of the Board of Management of the Royal Institute of Science, Bombay.

OPINION.

Under Section 2(4) of the Bombay Shops and Establishment Acts, 1948, only such charitable or other trusts which carry on business, trade, profession or industry or work in connection with or incidental or ancillary thereto are included in the definition of the word "Commercial Establishment".

The office of the Board of Management of the Bombay Properties of Institute of Science cannot be said to be carrying on any business, trade, profession or industry".

Clearly the Board of Management is not carrying on any trade or profession of industry. Trade really presupposes buying or selling of merchandise. Profession will require learning a particular skill. The word "business" means "anything which occupies time and attention and labour of a mand for the purpose of profit or improvement". Smith Versus Anderson (1880) 15, Ch. D 247 per Jessel M.R.

Thus the idea of profit is usually associated with all business, trade or profession. It cannot be suggested that the Board of Management is managing the properties with a view to make profits. As trustees, they are bound to carry out their duties efficiently in the interest of the trust.

I agree with the opinion given by R.L.A., that it would be difficult to include the Board of Management within the definition of the word "Commercial Establishment".

I may however add that sometimes the word, "Business" is used in a very wide sense and the idea of pecuniary profit is entirely absent. This type of cases usually occurs when the

the word "business" is used inconnection with restrictive cov-
en-enants in a lease. This in Hakls Vs. Miller, 27 Ch. D. 71 at page 88 Lindley L.J. while interpreting the word "business" in a restrictive covenant in a lease stated as follows:-

"The word "business" means almost anything which is an occupation as distinguished from pleasure; anything which is an occupation or duty which requires attention is "business".

But I do not think that the word "business can be given such a wide meaning when used in the definition of word "Commercial Establishment" in Section 2(4). The word should be understood in the practical sense of the term or in any sense in which a man of business would use that word.

A case very similar to the present came to be considered by the Rangoon High Court in a case reported in 1, I.T.C. 50 (In re:- Kaladan Curatee Bazar). It was a case under the Excess Profits Duty Act. There it was held that when a registered limited company owned house property consisting of stall and tenements let out for rents and distributed the rents collected as dividends to its shareholders it was not carrying on business. At page 54 of the said Report after referring to meaning of the word "business" as given in Smith Vs Anderson, it is observed as follows:-

"A man who has invested his capital in house property and keeps a rent office and a staff of rent collectors, clerks, etc for the purpose of letting out the house and collecting the rent is not carrying on business".

Under the circumstances, I think it would be difficult to regard the Board of Management as a Commercial Establishment as defined in Section 2(4) of the Act.

Sd/-

Advocate General of Bombay.

KVK. 9/6.

Office of the R.L.A.

Re. Tailors-Whether employees.
The Bom. Shops and Establishments Act, 1948.

Section 2(6).

The Federation of Bombay Clothes Manufacturer's Associations, Bombay, have made a represenation to the Secretary, Labour Department as follows:

"The readymade clothes manufacturing establishments are employing certain persons to do tailoring work as a job work. They work in the premises of the establishment on the sewing machines provided by the establishment with the material of the establishment and are sometimes even attached to the establishment but are not an the regular staff of the establishment and are not completely under the control of the proprietor of the establishment as his other employees. They have no fixed wages nor do they have any rigid restrictions about their attendance or hours of work. They come as they please and do so much work as they may be in a mood to do. Sometimes they work for two or more establishments at the same time. They are paid according to the quantity of work done by them. Are these persons to be considered as employees of an establishment within the meaning of the Bombay Shops and Establishments Act, 1948?".

The Secretary, Labour Department, considers that they are employees. The R.L.A. is requested to advise.

"Employee" as defined in section 2(6) of the Bombay Shops and Establishments Act, 1948, means a person wholly or principally employed in and in connection with any establishment and includes an apprentice, but does not include a member of the employer's family. "Employer" as defined in section 2(7) means a person owning or having ultimate control over the affairs of an establishment. The tailors who are working in the establishment are paid their wages according to the quantity of work turned out

by them. The word "employed" in the definition of "employee" in section 2(6) connotes the relationship of master and servant. The question would, therefore, turn upon the nature of the relationship between the establishment and the tailors. A contractor is a person who carries on an independent business and is hence often called an independent contractor. Unlike a servant, a contractor is not generally under the control of his employer. To distinguish between an independent contractor and a servant the test is whether or not the employer retains the power not only of directing what work is to be done but also of controlling and directing the manner of doing the work (see Bower v. Hall (1881) 6 Q.B.D. 333). In Underwood v. Perry & Sons Ltd., (1922) 15 D.W.C.131 C.A.) a workman was engaged by a firm to break up old metal by means of blasting. He had no regular hours of work. His time of arrival depended on the kind of morning and the work to be done. He could leave when he liked. He pleased himself and did not go to work every day as there was not always work. The question arose whether the relationship of master and servant existed. Lord Sternandale M.R. held;

> "By 'control' I do not mean the actural control that in practice was exercised every day because with a skilled workman the employer or the foreman is not always exercising control as to how to do his work. It is not necessary that it should be so because he knows how to do it. But the question whether there is in the background in the last resort the power of control over not only what the man has to do, but how he has to do it is of great importance indeed. It is not necessary to say that he cound not have control of service without this control - But if there was not that power of control as to the way in which the work is to be done in

details, it would be very hard to establish a contract of master and servant".

Applying the test laid down in that case to the facts of the present case, it appears that the establishment has in the last resort the power of control over not only what the tailors have to do but how they have to do it, because they work with the materials supplied by the establishment and they have to work also in the premises of the establishment on the sewing machines provided by the establishment. The payment of wages would certainly depend on the quality of work turned out by the tailors and the economic use of the materials supplied by the establishment. The reputation of the establishment would depend on the quality of the work done by the tailors. Consequently, the establishment could be presumed to have the power of controlling and directing the manner of doing the work. It appears therefore that there exists a relationship of master and servant between the establishment and tailors in the present case.

Sd/- P.M. LAD,
Remembrancer of Legal Affairs.
10/10

U.R. to Labour Department No. 11418, dated the 13th October 1949.

Submitted for signature.

Id/- 10/10.

A.A.S. Id/- 10/10

A.L.R. R.K. 10/10.

Issued

C.SPP.
13/10.

EVY. 9/6.

Office of the R.L.A.

Bombay Shops and Establishment Act, 1948. Entertainments on Public streets.

The view taken by Secretary, Labour Department is correct. "Other place of public amusement of public entertainment" in section 26m of the Bombay Shops and Establishments Act means an ascertained fixed spot, that is, with certain circumscribing limits and so far ejusdem generis with "theatre" (c.f. 7 B.L.R. 333 at p. 335). Streets or public places where entertainment programmes are arranged by the public would not be places of public amusement or public entertainment within the meaning of section 26.

Sd/- 7/11
Remembrancer of Legal Affairs.

U.R. to Labour Department No. 12567, dated the 7th November 1949.

submitted for signature.

Id/- 7/11

A.A.S. Id/- 7/11

A.L.R. R.K. 7/11

EVY. 9/6.

Office of the R.L.A.

"Employee" as defined by sec. 2(6) of the Bombay Shops and Establishment Act, 1948 means a person wholly or principally employed in and in connection with any establishment. "Commercial establishment" as defined in sec. 2(4) means an establishment which carries on any business etc., and "establishment" as defined in sec. 2(8) means a shop, commercial establishment, residential hotel, restaurant etc. It is nowhere clearly defined as to what an "establishment" is. The ordinary meaning of establishment is "organized body or men maintained for a purpose; staff or servants etc; house of business (see the Concise Oxford English Directionary). The words "or" and the word "and" are often used interchangeably, and there are occasions when the court through construction may change one to the other. This change may be proper only in order to more accurately express or to carry out the obvious intent of the legislature when the statute itself furnishes cogent proof of the error of the legislature, and especially where it will avoid absurd or impossible consequence or operatre to harmorize the statute and give effect to all its provisions (see Crafford on Statutory Construction pp. 322-23; Maxwell on Interpretation of Statutes, 9th Edn. p.249). Unless the word "and" is read as meaning "or" the words "in connection with" in sec. 2(6) will be meaningless, for the definition would exclude those employees employed in the establishment but not in connection with the establishment.

If the word "and" is not so construed, the words "in connection with etc." have no use; for a person who is employed in an establishment is not likely to be different from a person employed in connection with any establishment. It is no doubt true that an establishment must have a local habitation and a name but it is possible that employees in such an establishment may be employed elsewhere e.g. motor drivers of a public transport service. The same view was expressed by the Additional Secretary in his opinion No. 5022, dated 7/5/1949.

Sd/- P.M. LAD,
8/11
Remembrancer of Legal Affairs.

U. R. to Labour Department No. 12642, dated the 9th November 1949.
(Please also see R.L.A's No. 1043, dated 23/1/1950).

EVI. 9/6.

R.I. No. 16245, dated 6/10/1949.

Submitted.

2. Please see Advocate General's opinion No. 19 dated 9th August 1949 and the extract from the case reported in 1, I.T.C. 50 (In re Laladan Sartee Bazar). On p. 54 of the said report it is observed as follows:

"A man who has invested his capital in house property and keeps a rent office and a staff of rent collectors, clerks etc., for the purpose of letting out the house and collecting the rents is not carrying on business".

The Labour Department considers that if the word "business" as used in the definition of "commercial establishment" is given the meaning ascribed to it in the said report, it would follow that if a landlord keeps an establishment in which a staff or rent collectors, clerks etc. are employed for the purpose of collecting rents and looking after this property, his establishment would not be carrying on business within the meaning of section 2(4) of the Act.

The R.L.A. is requested to advise.

EVY. 9/6.

Office of the R.L.A.

Seen and returned.

The view taken in the Labour Department Office note on p. 67 ante, is correct.

Sd/- P.H. LAD,
14/4
Remembrancer of Legal Affairs.

U. R. to Labour Department No. 12926, dated 15th November 1949.

Submitted for signature.

Id/- 14/11.

A.A.S. Id/- 14/11.

A.L.R. R.K. - 14/11.

Issued

C.S.P.
15/11.

EVI. 9/6.

.D.R.I. No. 167/14/10/49.

Submitted.

The Indian Banks Association have requested that they may be allowed to split up the rest interval required to be given to the employees under Sec. 15 of the Bom. Shops & Estt. Act, 194[illegible] into two intervals of half an hour each, the first interval being granted at any time between 12 noon and 2 p.m. and the other at the ends of 5 hours from the commencement of work for the day.

R.L.A. has been requested to advise whether the request is legally feasible.

Additional Secy.

I agree with R.L.A's need. ~~[illegible]~~

The interval of an hour after full hours work cannot be split up. An amendment of the Act will be necessary for such splitting.

J.R.D.

Sd/- ~~D.V. VYAS~~,

U. R. to Labour Department No. 12524, dated 7th November 1949.

EVY. 9/6.

Office of the R.L.A.

The public Prosecutor, Bombay, in his letter at page 1 ante has raised the question whether his office establishment is exempt from the operation of the provisions of the Bombay Shops and Establishments Act, 1948. Under entry 2 in Schedule II to that Act the Offices of the Provincial Government are exempt from all the provisions of the Act. The question for consideration therefore is whether the office of the Public Prosecutor is a Government office. Webster defines an office to be "the place where a particular kind of business or service for others is transacted; a house or apartment in which public officers and others transact business; as a registrar's office, a lawyer's office". The expression "offices of the Provincial Government" will denote "public offices". In re Hirams (1891), 1 Q.B. 594 Cave J. said at p. 596 "to make the office a public office the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term". Under rule 13 of the Bombay Law Officers (Conditions of Service) Rules, 1939, the Public Prosecutor is paid, in addition to his salary, an office allowance of Rs. 635 per month. Whatever staff he maintains out of this money will be Government staff and the office they work in doing Government work will be a Government office. Consequently the office of the Public Prosecutor would be exempt from the provisions of the Act.

2. Before the Public Prosecutor is informed accordingly the Labour Department may please see.

Sd/- P.M. LAD ,
Remembrancer of Legal Affairs.

U.R. to Labour Deptt., No. 13632 , dated 28/11/49.

Office of the R.L.A.

The Public Prosecutor, Bombay, in his letter at page 1 ante has raised the question whether his office establishment is exempt from the operation of the provisions of the Bombay Shops and Establishments Act, 1948. Under entry 2 in Schedule II to that Act the Provincial Government are exempt from all the Offices of the Provisions of the Act. The question for Of the Public Prosecutor is a Government office. consideration therefore is whether the office. Webster defin defines an office to be" the place where a particular kind of business or service for others is transacted; a house or apartment in which public officers and others transact business; as a registrar's office, a lawyer's office". The expression "offices of the Provincial Government "will denote" public Offices". In re Mirams (1891), 1 Q.B. 594 Cave J. said at p. 28 596 "to make the office a public office the pay must come out of national, and not out of local funds, and the office must be public in the strict sense of that term". Under rule 18 of the Bombay Law Officers (Conditions of Service) Rules, 1939, the Public Prosecutor is paid in addition to his salary, an office allowance of Rs. 625 per month. Whatever staff he maintains out of this money will be Government staff and the office they work in doing Government work will be a Government Office. Consequently the office of the Public Prosecutor would appear to be exempt from the provisions of the Act.

2. Before the Public Prosecutor is informed accordingly the Labour Department may please see.

Sd/- P.M. Lad,
26/1
Remembrancer of Legal Affairs.

U. R. to Labour Deptt. No. 13632, dated the 28th November 49.

EVY. 9/6.

No. 14370

Legal Department,

Bombay Castle (Bombay No. 1), 23rd Dec. 49

To

The Public Prosecutor for Bombay.

Subject:- Application of the Bombay Shops and Establishments Act, 1948 to the establishments of the Public Prosecutor.

Sir,

With reference to your letter No. 3245, dated the 11th October 1949, on the above subject, I am to observe as follows:-

Under entry 2 in Schedule II to the Bombay Shops and Establishments Act, 1948 the Offices of the Provincial Government are exempt from all the provisions of the Act. The question for consideration therefore is whether the office of the Public Prosecutor is a Government office. Webster defines an office to be "the place where a particular kind of business or service for others is transacted; a house or apartment in which public officers and others transact business; as a registrar's office, a lawyer's office". The expression "offices of the Provincial Government" will denote "public offices". In re Mirams (1891), 1 Q.B. 594 Cave J. said at p. 596 "to make the office a public office the pay must come out of national, and not out of local funds, and the office must be public in the strict sense of that term". Under rule 13 of the Bombay Law Officers (Conditions of Service) Rules, 1939, the Public Prosecutor is paid, in addition to his salary, an office allowance of Rs. 635/- per month. Whatever staff he maintains out of this money will be Government work will be a Government office. Consequently the office of the Public Prosecutor would be exempt from the provisions of the Act.

Yours faithfully,
Sd/- Secretary to Government.

Legal Department.

R.I. No. 17714 dated 29-10-4..

Submitted.

Please see R.L.A's opinions Nos. 6898 and 11366 dated 22nd June 1949 and 12th October 1949 respectively.

Secretary, Labour Department thinks that if the Ball rooms and Dinner Halls are held to be restaurants within the meaning of the Bombay Shops and Establishments Act, 1948, on the ground that they are open to the public on the days on which public entertainment such as dance or cabaret is provided in these places, they would be governed by Chapter V (Secs. 26 to 31) of the Act.

R.L.A. has been requested to advise whether this will be so.

Reply may be:

/ seen and returned

The view taken by Secy. Labour Department is correct.

Sd/- R.T.K.

P.N. Lal, R.L.A.

U. R. to Labour Department No. 12619, dated 9-11-49.

EVV. 9/6.